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No. 82-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EDWIN F. GORDON,
Petitioner

v.

GEORGE A. TERRY, SR., *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS T. R. ANDERSON AND ROBERT D. LACEY'S MEMORANDUM IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

PAUL B. ERICKSON *
MICHAEL J. PUCILLO
ALLEY, MAASS, ROGERS, LINDSAY & CHAUNCEY
321 Royal Poinciana Plaza South
P.O. Box 431
Palm Beach, FL 33480
(305) 659-1770
Attorneys for Respondents, Anderson & Lacey

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the lower Court's affirmance of the entry of summary judgment in favor of T. R. Anderson and Robert D. Lacey, in accordance with Rule 56(e), Fed. R. Civ. P. merits review by this Court on a Writ of Certiorari.

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STATEMENT OF THE CASE

The facts set forth in the Eleventh Circuit's opinion accurately summarize the procedural history of this case. Respondents T. R. Anderson and Robert D. Lacey (Anderson and Lacey) direct the Court's attention to those findings which relate to the affirmance of their Motion for Summary Judgment.[1]

Petitioner has named as defendants, in the course of numerous amended complaints, anyone who had any involvement in the land syndication complained of, and in some instances those who had no involvement whatsoever. The five separate complaints which gave rise to the Eleventh Circuit's opinion in *Gordon* v. *Terry* were first

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[1] All citations to the record are to the page number of the record in the Court of Appeals.

filed in March of 1976. Nowhere in those complaints were Anderson and Lacey named as defendants. On January 18, 1980, Anderson and Lacey were first named as defendants.[2] They were again named as defendants in the Third Amended Complaint filed on April 11, 1980. Anderson was first served with a summons and a copy of the *Terry* Complaint on May 13, 1980.[3] Lacey was first served with the *Terry* Complaint on May 12, 1980.[4] Respondents Anderson and Lacey were served only in *Terry*, Case No. 80-5797, which case allegedly arose out of the Magnolia Ranch land title trust.

Anderson and Lacey moved for dismissal and for summary judgment, on June 4, 1980. In support of their Motion for Summary Judgment, they submitted affidavits disclaiming "any interest whatsoever" in the Magnolia Ranch land title trust.[5] On September 5, 1980, the District Court entered summary judgment as to all defendants. The District Court did not indicate a separate basis for entry of summary judgment in favor of each defendant.

On appeal, Anderson and Lacey argued that summary judgment should be affirmed as to them for two reasons separate and apart from the substantive securities law issues: first, the action was barred by the limitation provisions of the Florida Blue Sky Act; and second, that summary judgment was appropriate under Rule 56(e) Fed. R. Civ. P. In affirming summary judgment as to Anderson and Lacey, the Court of Appeals stated:

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[2] R. 1068. Petitioner did not seek leave to amend pursuant to Rule 15(a). He simply added Respondents Anderson and Lacey to the Amended Complaint. That Amended Complaint was dismissed with leave to amend before Anderson and Lacey were served with process.

[3] R. 1479.

[4] R. 1481.

[5] R. 1521, 1523.

> We note that in conjunction with their motion for summary judgment, Anderson and Lacey submitted affidavits in which they denied having any connection, either as sellers or as co-investors, with the Magnolia Ranch real estate investment, Case No. 80-5797, the only case in which they were served. Gordon has not responded to their assertions. *Gordon* v. *Terry*, 684 F.2d at 744 n. 10 (11th Cir. 1982); Petitioner's Appendix at 37a.

The Court further noted that Petitioner's complaints and affidavits contained only "bare assertions that the Defendants[6] 'conspired', 'controlled', or retained Green as their 'agent' . . . insufficient to create an issue as to Gordon's dependency on these Defendants. . . ." "These conclusory allegations" unsupported by specific facts were held insufficient to avoid summary judgment. *Gordon* v. *Terry*, 684 F.2d at 743-744.

OBJECTION TO THE JURISDICTION OF THIS COURT TO GRANT A WRIT OF CERTIORARI IN CASE NOS. 80-5798 - 80-5801

The record in the Court below clearly indicates that Respondents T. R. Anderson and Robert D. Lacey were served with process only in *Gordon* v. *Terry*, Case No. 80-5797.[7] The Court of Appeals took note of that fact in its opinion. *Gordon* v. *Terry*, 684 F.2d at n. 10 (Petitioner's Appendix p. 37a). Accordingly, this Court lacks jurisdiction to issue a Writ of Certiorari in the four companion cases: *Gordon* v. *M. M. Overstreet*, *Gordon* v. *Green*, *Gordon* v. *Hobe Properties, Inc.*, and *Gordon* v. *Hamm*, as to Respondents Anderson and Lacey.

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[6] Included in this group of "defendants" are the seller of the Magnolia Ranch and those defendants petitioner labeled as "inside investors". The so called "insiders" are: Anderson and Lacey, Pierre Heftler and William Rudkin. All of these defendants were co-investors with Petitioner in other land title trusts.

[7] See Footnotes 3 and 4 *supra*.

ARGUMENT

AFFIRMANCE OF THE ENTRY OF SUMMARY JUDGMENT IN FAVOR OF T. R. ANDERSON AND ROBERT D. LACEY IN ACCORDANCE WITH RULE 56(e) DOES NOT MERIT REVIEW BY WRIT OF CERTIORARI

Petitioner, Edwin F. Gordon, has included T. R. Anderson and Robert D. Lacey as respondents and in his list of interested parties. Apparently, Petitioner seeks review of the Eleventh Circuit's affirmance of summary judgment on his claims against all respondents, including those with no involvement in the land syndication complained of, such as Anderson and Lacey. Yet the affirmance of summary judgment in favor of those respondents hardly raises questions appropriate for a Writ of Certiorari under Rule 17 of the Supreme Court Rules. The Eleventh Circuit's opinion, as it relates to Anderson and Lacey, simply reflects the application of Rule 56(e) of the Federal Rules of Civil Procedure to this case, and does not merit review by this Court.

Petitioner contends that the Eleventh Circuit's opinion in this cause is in conflict with prior opinions of this Court and other Circuit Courts on the question of liability of collateral participants in securities transactions. With respect to Respondents Anderson and Lacey, that argument entirely ignores the plain language of the opinion in the Court below. Anderson and Lacey moved for summary judgment in the District Court asserting that they had no connection whatsoever to the Magnolia Ranch real estate investments. In affidavits submitted by Anderson and Lacey in support of their Motion for Summary Judgment, they each stated:

> . . . he [the affiant] does not now have and never has had any involvement whatsoever in any aspect of the Magnolia Ranch real estate, the investment of Edwin F. Gordon with respect thereto, or any contracts or other agreements, the trust referred

> to in the Third Amended Complaint or the administration thereof, or any other aspect of the matters referred to in the Third Amended Complaint . . . he never sold Plaintiff any beneficial interest in the so-called Magnolia Ranch investment contract nor offered for sale any such interest.

As the Court of Appeals noted, Petitioner did not respond to these assertions.[8] He simply rested on the bare assertions in his complaint that Anderson and Lacey, along with numerous other defendants, sold a beneficial interest in the Magnolia Ranch land title trust to Petitioner, and generally conspired with others to defraud Petitioner in connection with that sale. This is precisely what Rule 56(e) proscribes. A party may not "rest upon the mere allegations" in his complaint. The Rule requires the party against whom summary judgment is sought to "set forth specific facts showing that there is a genuine issue for trial". The Court below correctly noted that Petitioner failed to make that required showing. While the Court below did not specifically cite Rule 56(e), two of the cases cited by the Court, *Securities & Exchange Commission* v. *Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980), and *Benton-Volvo-Metairie, Inc.* v. *Volvo Southwest, Inc.*, 479 F.2d 135, 138-139 (5th Cir. 1973), rely on Rule 56(e).

Petitioner acknowledges that the record does not contain any "specific facts" to support the allegations that Anderson and Lacey conspired with the "principal Defendants." (Petition for Certiorari at 8.) Petitioner blames this inadequacy on lack of discovery, and suggests that he should be permitted to proceed against these respondents in the hope that some evidence will turn up by the time of trial. This suggestion ignores the clear mandate of Rule 56(e). When faced with a properly supported summary judgment motion the Petitioner must come forward with some significant proba-

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[8] Gordon v. Terry, 684 F.2d at 744 n. 10.

tive evidence to support his complaint. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290 (1962); *Weit* v. *Continental Illinois National Bank and Trust Company of Chicago*, 641 F.2d 457, 462 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1610 (1981). Absent such a showing, summary judgment is appropriate.

In summary, the Court below correctly affirmed the entry of summary judgment in favor of Respondents Anderson and Lacey on the basis of Rule 56(e). That decision hardly merits review by this Court on a Writ of Certiorari. Even if Petitioner is correct in his analysis of the law of civil liability of collateral participants, the fact remains that Petitioner failed to come forward with specific facts to support the allegations in his complaint, as is required by Rule 56(e), and the Court below correctly affirmed summary judgment. This Court interpreted Rule 56(e) to mean precisely what it says in *First National Bank of Arizona* v. *Cities Service*, 391 U.S. at 289-290, and need not address that question anew.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the affirmance of summary judgment in favor of Anderson and Lacey should be denied.

Respectfully submitted,

PAUL B. ERICKSON *
MICHAEL J. PUCILLO
ALLEY, MAASS, ROGERS, LINDSAY & CHAUNCEY
321 Royal Poinciana Plaza South
P.O. Box 431
Palm Beach, FL 33480
(305) 659-1770
Attorneys for Respondents, Anderson & Lacey

* Counsel of Record